



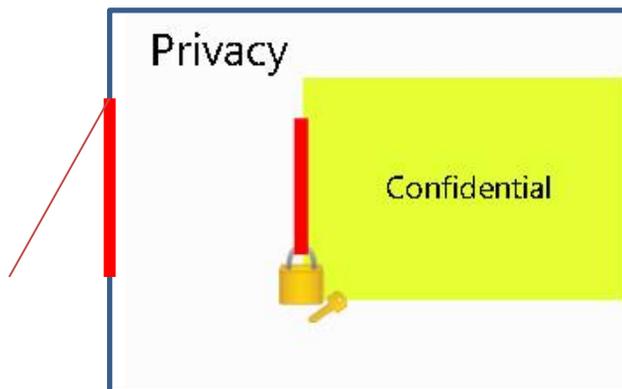
Protecting Victims' Privacy: Confidentiality and Privilege Primer

Privacy is vitally important to many crime victims.¹ In fact, maintaining privacy is so important that many victims refrain from accessing critical medical and counseling services without an assurance that treatment professionals will protect their personal information from disclosure. Understanding this, and wishing as a matter of public policy to encourage access to treatment when needed, federal and state legislatures and professional licensing bodies have created frameworks of statutes and regulations that help protect the information victims share with professionals from further dissemination.² Generally, these protections come in two forms: “confidentiality” and “privilege.” Although many individuals are familiar with these terms, their legal meaning and how they protect victim privacy are often misunderstood. Confidentiality and privilege are different legal concepts and provide different levels of protection for victim information.³ To best serve victims and protect their privacy interests, professionals who work with victims should understand the interplay between confidentiality and privilege and the different levels of protection they provide.

A. *The privacy closet.*

One way to understand the differences between confidentiality and privilege is to conceptualize privacy as a closet containing of all the personal information that a victim wishes to keep shielded from public view. Generally, the victim can decide when to open the closet, whom to let in, and how much each person can view while inside. There is no lock on the closet, but because the closet is in the victim's home, she⁴ generally controls who may access it.

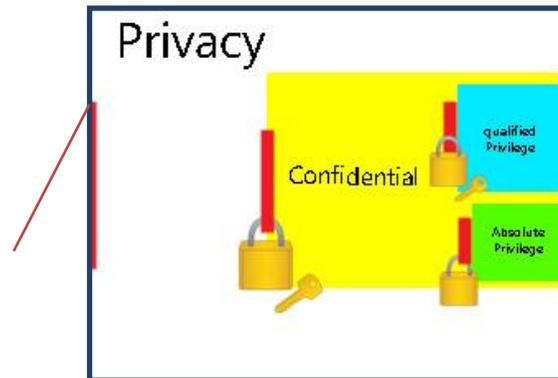
1. Confidentiality: A Locked Safe within the Closet



Many victims will access services such as counseling or medical treatment in the aftermath of crime. In seeking such treatment, a victim will frequently be required to “open the closet” and share highly sensitive personal information with professionals. When this information is particularly sensitive, the victim keeps it in a locked safe within the closet. The victim is willing to give the professionals a key to the safe, but only on the condition that the professionals promise not to open the safe and provide access to the information to anyone else. The promise to hold in confidence the victim’s information is governed by the professional’s ethical duties,⁵ regulatory framework,⁶ and/or by other various laws,⁷ and breaking the promise may carry sanctions.⁸ The promise not to disclose information that is shared in confidence—as well as the legal framework that recognizes this promise—are what qualifies this information as “confidential.” Described another way, confidentiality is a legal and ethical duty not to disclose the victim-client’s information learned in confidence.

When providing services, professionals must be careful not to mislead a victim about the level of protection provided to information designated as “confidential.” Although state laws may explicitly prohibit disclosure, there are often exceptions that require disclosure in response to court orders or valid subpoenas.⁹ For example, a court may make a determination that other interests outweigh the victim’s right to privacy in confidential information and order the professionals to turn over their key to the victim’s safe. Although a victim can be assured that a professional may not ethically disclose her confidential information unless legally required to do so, it is important that a victim understand that courts have the authority to require a professional to break the promise of confidentiality when certain conditions are met.¹⁰

2. Privilege: A Lockbox within the Safe



Legislatures throughout the country have recognized that the effective practice of some professions requires even stronger legal protection of confidential communications between the professional and client. This recognition has resulted in the passage of laws that prevent courts from forcing these professionals to break the promise of confidentiality no matter how relevant the information is to the issues in the legal proceeding.¹¹ This additional protection is “privilege”—a legal right not to disclose certain information, even in the face of a valid subpoena.¹² Applying the closet metaphor, privilege exists as a lockbox within the safe of confidentiality. Significantly, only the victim has a key to the privilege lock box, and only the victim—as the holder of the privilege key—may waive the privilege and permit disclosure of the information.¹³

There are three types of lockboxes (privileges): absolute, absolute diluted, and qualified.¹⁴ An absolute privilege is one in which only a victim has the key to her own lockbox and the court can never order the information within that lockbox to be disclosed without the victim’s consent.¹⁵ Because privileges run contrary to the truth finding function of courts, evidentiary privileges are narrowly construed,¹⁶ and for courts to conclude an absolute privilege exists, the statute must be explicit in purpose and cannot contain exceptions.¹⁷

Qualified and absolute diluted privileges are where the court may order a victim to turn over the key under specific conditions and only after the party seeking disclosure of the privileged material makes a showing in court.¹⁸ These conditions may be explicit in the privilege statute or are developed through case law.¹⁹ The legal hurdles to obtaining disclosure of

privileged material is high because the significant policy interests in favor of keeping the information in the lockbox have been established by the legislature and requesters must demonstrate that their need outweighs these established interests.

Conclusion

Because maintaining a victim's control over whether and how to disclose her personal information is so important, professionals must know whether their communications with a victim-client and the associated records are confidential or privileged in nature, as well as how courts in their jurisdiction have interpreted the scope of protection. Equally important, professionals must inform their victim-clients in advance whether communications and records are confidential or privileged and any limitations on the ability of the professionals to protect that information. To do otherwise may provide victim-clients with a false sense of security that the information can *never* be disclosed to a third party, and thus inflict further harm on them if their personal information is unexpectedly disclosed in court or to a third party.²⁰ Arming crime victims with the information they need to make informed decisions about when, how, and to whom to disclose their personal information—including informing victims about confidentiality and privilege—is one way in which professionals can ensure that victims have agency in determining their path to recovery.

Practice Pointers

- *Know your jurisdiction's law.* Know the laws and regulations that govern your profession. Case law is important as it will further define the scope of the protections found in statute or rule.
- *Provide timely notification of subpoenas to your client.* Inform your clients that you will notify them if you ever receive a subpoena or court order to turn over their confidential /privileged materials. Notice will provide the victim with an opportunity to challenge the subpoena/order in court. For assistance with jurisdiction-specific confidentiality and privilege questions and to access sample motions to quash, please contact NCVLI, <http://law.lclark.edu/live/forms/50-ta-request-for-attorneys-victim-advocates?preview=1>.
- *Be protective as possible of client privacy if required to turn documents over to the court.* If you must comply with a subpoena or court order for client information, argue for *in camera* review and turn the requested materials over to the Court—not an individual party—to minimize the privacy intrusion. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (finding that “[defendant]’s interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the [subpoenaed materials] be submitted only to the trial court for *in camera* review”). Keep in mind, however, that *in camera* review is still an invasion of the victim’s privacy and runs counter to the purpose of privileges. See *Commonwealth v. Kyle*, 533 A.2d 120, 131 (Pa. Super. Ct. 1987) (holding that “[s]ubjecting the confidential file [of rape victim’s mental health records] to *in camera* review by the trial court (as well as the appellate courts and staff members) would jeopardize the treatment process and undermine the public interests supporting the privilege. Simply stated, absolute privilege of this type and in these circumstances requires absolute confidentiality”). To best protect client privacy, consider seeking that the documents be subject to a protective order and/or filed under seal with the court.
- *Do not ignore a subpoena.* When faced with a subpoena for material that is covered by an absolute privilege you must respond by informing the court and/or the requester that the material is not subject to subpoena or else you risk being found in contempt of court.
- *Ensure your organization has a policy in place for responding to subpoenas for client information.* Having an office policy in place (and motion to quash templates at the ready) for responding to subpoenas for client records is good practice.

This resource was supported by Grant No. 2014-XV-BX-K013, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The information in this resource is educational and intended for informational purposes only. It does not constitute legal advice, nor does it substitute for legal advice. Any information provided is not intended to apply to a specific legal entity, individual or case. NCVLI does not warrant, express or implied, any information it may provide, nor is it creating an attorney-client relationship with the recipient.

¹ People are “harmed in a significant, cognizable way when their personal information is distributed against their will.” Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENNumbra 52, 61 (2007) (critiquing a recent article on privacy and arguing that it fails to adequately label and categorize the very real harms of privacy invasions). *See also generally, Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), March 2013, at 1 & 4 n.6, <http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool> (describing some of the deleterious effects of secondary victimization on victims and the proper administration of justice); Suzanne M. Leone, *Protecting Rape Victims’ Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 909-10 (1993) (A victim’s right to control information about him or herself “constitutes a central part of the right to shape the ‘self’ that any individual presents to the world. It is breached most seriously when intimate facts about one’s personal identity are made public against one’s will . . . in defiance of one’s most conscientious efforts to share those facts only with close relatives or friends”) (quoting Laurence H. Tribe, *American Constitutional Law* § 12-14, at 650 (1st ed. 1978)); *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (citation omitted) (“The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.”).

² *See, e.g., People v. Turner*, 109 P.3d 639, 645 (Colo. 2005) (citations omitted) (discussing purpose of victim-advocate privilege: “The statute’s legislative history is consistent with this understanding. Senator Wham, a co-sponsor of the amendment expanding the privilege to include rape crisis organizations, expressed that ‘the assumption of privilege’ is essential to encouraging victims to seek assistance. Senator Wham explained that it was important for victims to know, even before contacting advocacy centers that their communications would be kept confidential. In total, the victim-advocate privileges ‘reflect the role of [victim advocates] as the last resort from an abusive relationship and underscore the critical importance of anonymity and secrecy’ in protecting the victim from further abuse.”); *State v. J.G.*, 619 A.2d 232, 236 (N.J. Super. Ct. App. Div. 1993) (citations omitted) (discussing the purpose of the victim advocate privilege set forth in the legislative findings and declarations that “the psychological scars of victims of violent crimes can often be ameliorated by counseling, that treatment is most successful when the victims are assured their thoughts and feelings will not be disclosed, that confidentiality should be accorded to those who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists, and that it is the public policy of this State to bar disclosure of communications maintained by the counselor”); *Berry v. Moench*, 331 P.2d 814, 817 (Utah 1958) (discussing the purpose of doctor-patient confidentiality: “It is grounded upon the advantage to all concerned in encouraging the full disclosure of all facts which may have a bearing upon diagnosis and

treatment of the patient. If the doctor could with impunity publish anything that is true, the patient would be without protection from disclosure of intimacies which might be both embarrassing and harmful to him. This would make him reluctant to tell some things even though they might be important in the treatment of his illness.”); *Principles of Med. Ethics* § 3.2.1 (Am. Med. Ass’n 2016), <https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-3.pdf> (“Patients need to be able to trust that physicians will protect information shared in confidence. They should feel free to fully disclose sensitive personal information to enable their physician to most effectively provide needed services. Physicians in turn have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient.”).

³See, e.g., *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 449 (Wis. 2008) (explaining that “[l]egal privilege is a broader concept than confidentiality” and that “[w]hile confidential data is ‘meant to be kept secret,’ legal privilege includes ‘the legal right not to provide certain data when faced with a valid subpoena’”); John L. Calcagni III, *Confidential and Privileged Information*, in *A Practical Guide to Discovery and Depositions in Rhode Island* § 9.3 (Mass. Continuing Legal Educ., Inc. 2016) (“Privileged information, though also confidential, is most sacred and afforded much higher protection from disclosure than information that is solely confidential.”).

⁴For ease of reference and consistency, feminine pronouns are used in this memorandum when referring to victims of crime. This should not detract from the understanding that women perpetrate criminal acts; that men are victimized by criminal acts; that gender is not binary; and that all victims deserve access to justice.

⁵See, e.g., *Model Rules of Prof’l Conduct* r. 1.6(a) (Am. Bar Ass’n 2016) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”); *Principles of Med. Ethics* § 3.2.1 (Am. Med. Ass’n 2016), <https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-3.pdf> (“In general, patients are entitled to decide whether and to whom their personal health information is disclosed.”).

⁶For example, the Violence Against Women Act and the Family Violence Prevention and Services Act both provide grants to states to fund services for crime victims and require the organizations that receive funding to keep victim information confidential as a condition of funding. 42 U.S.C.A. § 13925 (b)(2)(A) (“In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and subgrantees under this subchapter shall protect the confidentiality and privacy of persons receiving services.”), (b)(2)(B) (“grantees and subgrantees shall not--(i) disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected; or (ii) disclose, reveal, or release individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian or in the case of legal incapacity, a court-appointed guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, incapacitated person, or the abuser of the other parent of the minor”); 42 U.S.C.A. § 10406 (c)(5)(B) (“grantees and subgrantees shall not-- (i) disclose any personally identifying information collected in connection with services requested (including services utilized or denied), through grantees’ and subgrantees’ programs; or (ii) reveal personally identifying information without informed, written, reasonably time-limited consent by the person about whom information is sought, whether for this program or any other Federal or State grant program”).

⁷ See, e.g., Cal. Civ. Code § 56.10(a) (“A provider of health care, health care service plan, or contractor shall not disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization, except as provided in [the statute].”); Mich. Comp. Laws Ann. § 333.18513 (2) (“Except as otherwise provided in this section, a communication between a registrant or licensee or an organization with which the registrant or licensee has an agency relationship and a client is a confidential communication. A confidential communication shall not be disclosed . . .”).

⁸ See, e.g., Cal. Civ. Code § 56.35 (“In addition to any other remedies available at law, a patient whose medical information has been used or disclosed in violation of [California’s Confidentiality of Medical Information Act] and who has sustained economic loss or personal injury therefrom may recover compensatory damages, punitive damages not to exceed three thousand dollars (\$3,000), attorneys’ fees not to exceed one thousand dollars (\$1,000), and the costs of litigation.”); Cal. Civ. Code § 56.36 (a) (“A violation of the provisions of [California’s Confidentiality of Medical Information Act] that results in economic loss or personal injury to a patient is punishable as a misdemeanor.”).

⁹ See, e.g., N.Y. Mental Hyg. § 33.13 (c)(1) (“[Confidential] information about patients or clients reported to the offices, including the identification of patients or clients, clinical records or clinical information tending to identify patients or clients, and records and information concerning persons under consideration for proceedings pursuant to article ten of this chapter, at office facilities shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except as follows: 1. pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality, provided, however, that nothing herein shall be construed to affect existing rights of employees in disciplinary proceedings.”); *People v. Wood*, 523 N.W.2d 477, 481 (Mich. 1994) (concluding that social worker’s obligation to report child abuse/neglect abrogated his statutory duty of confidentiality to minor who told him about her parent’s drug use in the minor’s home).

¹⁰ See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) (noting that absent a statutory directive or apparent state policy making confidentiality absolute, relevant confidential information could possibly be disclosed if a court of competent jurisdiction determines that the information is “material” to the defense in a criminal case); *Jane Doe v. Md. Bd. of Soc. Work Exam’rs*, 862 A.2d 996, 1009 (Md. 2004) (quoting *Dr. K. v. State Bd. of Physician Quality Assur.*, 632 A.2d 453, 459 (Md. Ct. Spec. App. 1993)) (“In those cases where a court has allowed intrusion into the privacy right in medical records, ‘it has usually done so only after finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case.’ . . . [The factors to be weighed] are: the type of record requested, the information it contains, the potential for harm in subsequent nonconsensual disclosure, the injury in disclosure to the relationship for which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the government’s need for access, and whether there is an express statutory mandate, articulate public policy, or other public interest militating towards access.”); *Johnson v. Johnson*, 731 N.E.2d 1144, 1147 (Ohio Ct. App. 1999) (noting that several Ohio courts have held that under certain circumstances confidential records of the children’s services agency must be made available to the trial court for an *in camera* inspection).

¹¹ See *Harper v. Healthsource N.H., Inc.*, 674 A.2d 962, 966 (N.H. 1996) (citation omitted) (“Evidentiary privileges protect communication within [certain] relationships [in society] from being revealed in litigation because society has determined that the relationship ‘ought to be sedulously fostered,’ and that ‘[t]he injury that would inure to the relation by the disclosure of the communications [is] greater than the benefit thereby gained for the correct disposal of litigation.’”).

¹² See, e.g., Ind. Code § 35-37-6-9(a) (“The following persons or entities may not be compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding: (1) A victim. (2) A victim advocate or victim service provider unless the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires.”); Or. Rev. Stat. § 40.264(2) (“a victim has a privilege to refuse to disclose and to prevent any other person from disclosing: (a) Confidential communications made by the victim to a certified advocate in the course of safety planning, counseling, support, or advocacy services. (b) Records that are created or maintained in the course of providing services regarding the victim”); 42 Pa. Const. Stat. § 5945.1(b)(1) (“No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim’s confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.”); Wis. Stat. § 905.045(2) (“A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated among the victim, a victim advocate who is acting in the scope of his or her duties as a victim advocate, and persons who are participating in providing counseling, assistance, or support services under the direction of a victim advocate, if the communication was made or the information was obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.”). See also *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 49 (Mo. 2004) (citation omitted) (“a privileged communication is a ‘communication that is protected by law from forced disclosure[.]’” as well as “[a]n evidentiary rule that gives a witness the option not to disclose the fact asked for, even though it might be relevant . . . esp. when the information was originally communicated in a professional or confidential relationship”); *Sands v. Whitmall Sch. Dist.*, 754 N.W.2d 439, 449 (Wis. 2008) (citation omitted) (“Legal privilege is a broader concept than confidentiality. While confidential data is ‘meant to be kept secret,’ legal privilege includes ‘the legal right not to provide certain data when faced with a valid subpoena.’”).

¹³ See, e.g., *Snibbe v. Superior Court*, 168 Cal. Rptr. 3d 548, 555 (Cal. Ct. App. 2014) (“While a physician may claim the physician-patient privilege, only the holder of the privilege may waive it, and the physician is not its holder.”); *People v. Madera*, 112 P.3d 688, 690 (Colo. 2005) (citation omitted) (“[T]he attorney-client privilege is personal with the client . . . Hence, the privilege may be waived only by the client.”); *Stetson v. Silverman*, 770 N.W.2d 632, 641 (Neb. 2009) (“Generally, an evidentiary privilege is waived when the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.”).

¹⁴ Absolute diluted privilege is a privilege that is absolute based on the statutory language, but courts have “diluted” by finding exceptions to the privilege in certain circumstances. Absolute dilute privileges and qualified privileges are similar in application. See, e.g., *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994) (finding that the statutory patient-psychotherapist privilege is absolute on its face but holding that “in an appropriate case there should be available the option of an *in camera* inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense”); see also *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions*, (Nat’l Crime Victim Law Inst., Portland, Or.), 2005, at 13-14, <https://law.lclark.edu/live/files/6471-confidentiality-and-sexual-violence-survivors-a> (defining the three types of evidentiary privilege).

¹⁵ See, e.g., *J.G.*, 619 A.2d at 237 (holding that in the absence of compelling circumstances, communications between a crime victim and a counselor consulted for treatment are absolutely immune from disclosure); *Commonwealth v. Wilson*, 602 A.2d 1290, 1294-95 (Pa. 1992) (finding that the

Pennsylvania sexual assault privilege is absolute and prohibits disclosure of records under any circumstances).

¹⁶ *J.G.*, 619 A.2d at 237 (noting that privilege interferes with the search for the truth and therefore must be narrowly applied); Recent Case, *Evidence-Evidentiary Privilege-Second Circuit Refuses to Recognize Journalists' Privilege for Nonconfidential Information.-Gonzales v. National Broadcasting Co.*, 155 F.3d 618 (2d Cir. 1998), 112 Harv. L. Rev. 2019, 2019 (1999) (noting that evidentiary privileges exist in opposition to the principle of every litigant having a right to “every person’s evidence” and hinder the search for truth, therefore courts and legislatures have been hesitant to create and expand such privileges).

¹⁷ *See In re Crisis Connection, Inc.*, 949 N.E.2d 789, 799 (Ind. 2011) (citation omitted) (concluding that Indiana’s victim advocate privilege is absolute where “the privilege protects victims, victim advocates, and victim service providers from being ‘compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding.’ It does not authorize any balancing of interests or *in camera* review in criminal prosecutions . . . it makes no exception for the disclosure of confidential communications or information by court order.”).

¹⁸ *Goldsmith v. State*, 651 A.2d 866, 877 (Md. 1995) (holding that “in order to abrogate a privilege such as to require disclosure at trial of privileged records, a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense” and finding that a “speculative assertion that the records might be relevant for impeachment” is not sufficient); *Commonwealth v. Dwyer*, 859 N.E.2d 400, 414 (Mass. 2006) (establishing protocol for defense counsel’s pretrial inspection of presumptively privileged records); *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952, 960 (N.H. 2006) (citations omitted) (noting that “the psychotherapist-patient privilege must yield when disclosure of the information concerned is considered ‘essential.’ To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure”).

¹⁹ *See, e.g.*, Fed. R. Evid. 501 (authorizing courts to modify evidentiary privileges: “The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”); Iowa Code § 622.10(4)(a) (“Except as otherwise provided in this subsection, the confidentiality privilege under this section shall be absolute with regard to a criminal action and this section shall not be construed to authorize or require the disclosure of any privileged records to a defendant in a criminal action unless either of the following occur: . . . (2)(a) The defendant seeking access to privileged records under this section files a motion demonstrating in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case . . . (b) Upon a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source, the court shall conduct an *in camera* review of such records to determine whether exculpatory information is contained in such records. (c) If exculpatory information is contained in such records, the court shall balance the need to disclose such information against the privacy interest of the privilege holder. (d) Upon the court’s determination, in writing, that the privileged information sought is exculpatory and that there is a compelling need for such information that outweighs the privacy interests of the privilege holder, the court shall issue an order allowing the disclosure of only those portions of the records that contain the exculpatory information. The court’s order shall also prohibit any further dissemination of the information to any person, other than the defendant, the defendant’s attorney, and the

prosecutor, unless otherwise authorized by the court.”); Minn. Stat. § 595.02(1)(k) (“Sexual assault counselors may not be allowed to disclose any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the treatment relationship, and the treatment services if disclosure occurs. Nothing in this clause exempts sexual assault counselors from compliance with [mandatory reporting of child abuse]”); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 74 (1st Cir. 1999) (citations omitted) (adopting a crime-fraud exception to the psychotherapist-patient privilege and reasoning that, “[t]he [U.S. Supreme] Court did not envision the psychotherapist-patient privilege as absolute or immutable. Rather, the Court suggested the possibility of exceptions to the operation of the privilege and prophesied that the details would emerge on a case-by-case basis”).

²⁰ *Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), March 2013, at 2-3, <https://law.lclark.edu/live/files/13797-ncvli-pv-victims-rights-enforcement-as-a-tool-to>.